

Universal Foods Corporation, d/b/a St. Louis Dr. Pepper Bottling Company and David Harsch.
Case 14-CA-14449

August 13, 1981

DECISION AND ORDER

On April 13, 1981, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Universal Foods Corporation, d/b/a St. Louis Dr. Pepper Bottling Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.²

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

BERNARD RIES, Administrative Law Judge: This matter was heard in St. Louis, Missouri, on February 2, 1981. Principally at issue is whether Respondent Universal Foods Corporation, d/b/a St. Louis Dr. Pepper Bottling Company, in violation of Section 8(a)(1) and (3) of the Act, retaliated against the Charging Party for filing a grievance pursuant to the procedure established in an applicable collective-bargaining agreement.

Briefs were received from the parties on or about March 9, 1981. Based on the entire record, my recollection of the demeanor of the witnesses, and due consideration of the briefs, I make the following findings of fact, conclusions of law,¹ and recommendations.

¹ Respondent conceded at the hearing that it is an employer engaged in commerce within the meaning of the Act, and I conclude that assertion of jurisdiction by the Board is appropriate here. Respondent also agreed at hearing that Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereafter called "the Union," is a statutory labor organization.

Respondent is engaged in the bottling and distribution of soft drinks and related products in St. Louis. The Union represents Respondent's 23 drivers, 20 helpers, and 4 vending personnel, and at relevant times the Union and Respondent were bound by a collective-bargaining agreement which provided for a grievance procedure.

David Harsch, the Charging Party, is one of Respondent's helpers, whose function is to accompany and assist drivers on their routes. Harsch, who began employment with Respondent in 1976, also acted as an assistant union steward servicing the helpers.

Prior to July 1980,² management officials would routinely serve as substitutes for absent route salesmen.

Around July, General Sales Manager Charles Lloyd and Sales Supervisor Dary DeBerry decided to use their management personnel more efficiently and to upgrade the helper position at the same time, by assigning qualified helpers to act as substitutes for missing drivers. Five helpers, Harsch being one of them, were approved by Respondent for such employment. Harsch thereafter substituted for various regular routemen for short periods, earning increased wages when he did so.

Richard Crider, a sales trainee,³ was injured in late July. On July 30, Respondent offered to allow Harsch to take over Crider's route for an extended period as a "temporary sales trainee." A written agreement entered into at that time between Respondent, Harsch, and David Henderson, a driver who served as the chief union steward, provided for such substitution and also that "[w]hen Richard Crider returns to assume his position, [Harsch] will then return to [his] route as a helper and continue in [his] capacity as such."⁴

Harsch served Crider's route until Monday, November 17, when he reported for work and found that Crider had returned to employment. Harsch spoke to DeBerry about an assignment and was told that he should drive the route normally served by Doug Blumenthal, who had been injured on the weekend preceding November 10. Until November 17, helper Tim Hunt had been serving the Blumenthal route. According to Harsch, DeBerry said that Harsch "would be running Blumenthal's route until he came back."⁵ Harsch thereupon left to take over the Blumenthal route.

Harsch had never before handled that route; he was also operating under the handicap of being without a helper. He sold fewer cases of soft drinks on Monday than any of the other drivers. This showing made Harsch the reluctant victor in a contest initiated by Respondent apparently 6 or 8 weeks before, in which, each day, the name of the high-volume driver for the preceding day would be featured, on a poster displayed in the

² All dates hereafter refer to that year, unless otherwise indicated.

³ This is, evidently, a category of employees training to be route salesmen.

⁴ The reason for executing such an agreement, according to General Sales Manager Lloyd, was to assure that Harsch had no illusions about becoming a "swingman," or a "substitute . . . on a permanent basis." Presumably the difference between such a category and the kind of substitution work that the five helpers were doing was that the former would do nothing but substitute for absent drivers, while the helpers, when not substituting, would be helping.

⁵ DeBerry testified that he was "just about sure" that he had not made such an indefinite assignment. I credit Harsch.

office, as "Superman," and the low producer as—what else— "Superdog." It was General Manager Lloyd's belief that this good-humored chivying would inspire competition among the drivers.

It inspired Harsch, when he saw his name shown in the office as "Superdog" on early Tuesday morning, to search out a grievance form. On the form, he stated the nature of his complaint as "Defamation of character in disagreement [sic] of my personal rights for having my name listed under 'Superdog,'" and, as a proposed settlement, Harsch asked "to never have my name up there again with an apology for having my name up there today." Harsch left the form on Lloyd's desk.⁶ According to Harsch, about 20 minutes later, Lloyd came downstairs and told Harsch, "Starting tomorrow, you're going to go back to being a helper."⁷ Harsch then left and, for the second and last time, drove Blumenthal's route.

Steward David Henderson testified that as he was checking in from his route later on Tuesday, at "approximately 2:35 in the afternoon," Lloyd came out of his office and told him, in the presence of DeBerry and other employees, that Harsch had "filed a grievance and that he had just hurt himself by doing this, that he was no longer what they had called a relief driver or a salesman, that he was now as [sic] a helper." In expanding on this theme, Lloyd told Henderson that "if they want to play games, we'll play games"; that Harsch had "won the battle, but he lost the war"; and that the demotion would "cost [Harsch] such and such money" and "if he can play around with money that way, he can play."

The circumstances of this case are such that, even without Henderson's testimony, a finder of fact, having credited Harsch's testimony, would feel virtually compelled to conclude that the decision to remove Harsch from Blumenthal's route was linked to the grievance filed by Harsch. Henderson's testimonial account of Lloyd's outburst, of course, if credited, makes any other conclusion impossible. That Henderson should indeed be considered creditable was indicated not only by his extremely impressive appearance, but also by the fact that Lloyd corroborated Henderson's testimony in significant part.

While denying that others were present, as Henderson had testified, Lloyd conceded at the hearing that he did have a conversation with Henderson in which he told the latter that Harsch had filed the grievance and that Harsch would no longer be labeled a "superdog" if he did not wish to participate in the contest. Lloyd went on: "My main concern there was the fact that I did not want to pull that superman-superdog contest off, because I thought it inspired the guys and did a job for us, because nobody really wanted to be the low man of the day. And my major concern was that it wasn't going to

be a grievance where we were going to wind up and completely remove it because of the other drivers." Lloyd denied saying to Henderson that Harsch had "won the battle but he lost the war" (explaining that it "would have been dumb for me to make a statement like that to the shop steward"), but he then offered that he had "made that statement to Mr. DeBerry." Asked what "war" Harsch had lost, Lloyd testified:

Well, you know, I was aggravated about the grievance, O.K., because I thought it was something that here we had given these guys a chance to make some money, we tried to upgrade their job, I worked very hard at really making that helper's job a good job so they could be a first class citizen in that plant like they should have been all along. I felt like there was no reason for the grievance because it was not a detriment to their character, it was simply something to try to motivate a person into doing something better the next day so that his name wouldn't be on there. But the reference was I just couldn't believe he did that. Besides, it was self-eliminating, we were going to a pre-sale system, changing the whole distribution system, and then helpers would not be running routes anyway.

Asked again what "war" Harsch had lost, Lloyd went on:

There was no war. It was just that, you know, as far as having a favor with me, I felt like it would be hard in the future for Dave to have favor with me after, you know, filing that grievance over that poster, without even talking about it first, discussing it, the reasons for the poster, or anything to do with the poster, really.

Lloyd's admission that he said on November 18 that Harsch had "won the battle but lost the war,"⁸ together with his testimonial concession of his animosity toward Harsch for having filed the grievance,⁹ make most unconvincing Lloyd's further testimony that he had nothing to do with Harsch's removal from the Blumenthal route on November 19 and DeBerry's testimony that he himself made the decision for neutral reasons.

DeBerry testified that none of the five helpers nominated for the relief driver pool had priority over one another, and that he personally made *ad hoc* decisions each

⁶ The "battle" won by Harsch was evidently Lloyd's decision, as he testified, to sustain the grievance by no longer including Harsch in the "Superdog" competition.

⁹ Henderson testified that the real "issue" seemed to him to be that Harsch had filed the grievance in writing prior to informally discussing it, contrary to the contract provisions; as set out above, Lloyd did speak of Harsch filing the grievance "without even talking about it first." If the point were relevant, and I do not think it is, Lloyd's other testimony makes it clear that he was "aggravated" about the substance of the grievance and Harsch's perceived ingratitude in challenging a pet project of Lloyd's after his efforts on behalf of the helpers, and not simply about a deviation from the contract procedure. Harsch credibly testified that he had filed 10 or 12 grievances in the same manner in the preceding 2 years without, apparently, provoking Lloyd. Furthermore, Lloyd also testified that Harsch's "[w]riting a grievance does not upset me. The circumstances surrounding the grievance upset me."

⁶ Lloyd and DeBerry testified that the form was actually presented to another subordinate manager first, but I see nothing of consequence in this detail. If I thought it necessary to decide the question, I would conclude that Harsch's version was the accurate one. Lloyd and DeBerry may possibly be confusing the "Superdog" grievance with another grievance filed by Harsch pertaining to an employee named Joe Emily, on November 19.

⁷ Lloyd denied that he spoke to Harsch about his return to helper status. I credit Harsch, both on demeanor and circumstantial considerations, as later described.

day as to which of the five would be assigned as substitutes, with an eye toward equalizing the work. He further said that he "[did not] believe" that he had told Harsch that he would be used in preference to any other helper, going on to say, "There is no way I could make that statement" given that Harsch was not a sales trainee. In this respect, DeBerry was contradicted by Harsch, who testified that when the list of five helpers was originally drawn up, he was told that he would have priority over the others,¹⁰ and by Timothy Hunt, a helper whose name appears second-ranked on the lists in evidence. Hunt testified that in July, DeBerry had told him that he "would be a driver and Dave Harsch would have first bid over me and if there was another route open, then I would have the second one."

I thought Harsch and Hunt to be excellent witnesses, and I would prefer their testimony to that of DeBerry on demeanor grounds. There is also an objective basis for discrediting DeBerry. Blumenthal was injured on the weekend of November 9, and Hunt ran the route during the following week. The fact that Harsch displaced Hunt on the Blumenthal assignment on Monday, November 17, when Crider's return made it unnecessary for Harsch to serve that route, strongly suggests that Harsch was in fact considered to have first bid on an available route.

The helper who took over the Blumenthal route from Harsch on November 19 was Dave Robinson, listed in third place on the approved helper-driver list. DeBerry testified that "two or three weeks" before, Robinson had said something to him about running the Blumenthal route, and that this seemed to be a good opportunity to give Robinson a chance. There is no explanation of why Robinson was not, for that good reason, assigned the Blumenthal route on Monday, November 17, instead of Wednesday, November 19, or of why it suddenly occurred to DeBerry, after Harsch had served the route for 2 days, to give Robinson the assignment. When DeBerry was asked why Harsch was assigned to Blumenthal's route, if he was supposed to return to helper status once Crider had returned, DeBerry could only offer the non-explanation that they were waiting to see whether Crider would be physically capable of resuming his duties.

In sum, it could scarcely be more amply established that Respondent removed Harsch from his assignment in order to retaliate against him for filing the "Superdog" grievance. That behavior constitutes a violation of Section 8(a)(3)¹¹ and (1) of the Act, as does Lloyd's statement to Henderson on November 18 that Harsch was being demoted for engaging in protected activity (a separate allegation of the complaint).¹² It is true, of course, that according to the written agreement signed on July 30, Harsch was to revert from "temporary sales trainee" status to "helper" status when Crider returned; but, even

in the latter status, he was, by virtue of both the established practice in regard to helper-drivers and DeBerry's language in posting him to the Blumenthal assignment, contemplated to be the continuing relief man on that route until Blumenthal returned. By denying Harsch that privilege because he filed a grievance, Respondent acted unlawfully. *Caterpillar Tractor Company*, 242 NLRB 523 (1979); *Diversified Industries, a Division of Independent Stave Company*, 208 NLRB 233, 238-239 (1974).

CONCLUSIONS OF LAW

1. Universal Foods Corporation, d/b/a St. Louis Dr. Pepper Bottling Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By removing David Harsch from his assigned route on November 18, 1980, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By telling an employee on November 18, 1980, that Harsch was being removed from his assigned route because he engaged in protected activity, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In order to remedy the unfair labor practices found here, I shall recommend that Respondent be required to cease and desist therefrom and to take certain affirmative action.

The evidence (Resp. Exh. 2) shows that Harsch was retained on the approved helper-driver list after November 18,¹³ and he testified that he was assigned as a substitute on perhaps three occasions between then and December 31; he also testified that others on the list received assignments during that period as to which he should have had first option. This testimony indicates that the complaint is in error in alleging that on and after November 18, Harsch was transferred "from a substitute route salesperson position to a helper position." More accurately, Harsch was retained as a "helper," his proper status after the Crider agreement expired, but he was not accorded the priority assignment to Blumenthal's route to which he was entitled. The least that can be said is that, everything else being equal, Harsch would have remained on Blumenthal's route until some later time.

The extent of the appropriate remedy is not wholly clarified by this record. The parties negotiated a new bargaining agreement, concluded, according to General Manager Barry Hargis, "late in November." It bears an effective date of November 1, 1980, and a terminal date of October 29, 1983. When it was actually put into effect is unclear. Article 15, section 9, thereof states that helpers may be worked "by seniority" as "extra drivers" for a "temporary period," but if that period exceeds 10 days,

¹⁰ On the two lists in evidence, Harsch's name leads the rest, including employee Hahn, whose seniority exceeds that of Harsch.

¹¹ The discrimination would appear to be violative of Sec. 8(a)(3), as well as Sec. 8(a)(1), on the theory advanced in *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 805 (1945).

¹² Although Lloyd denied that he had been speaking to Henderson when the inculpatory remarks were made, it is inescapable that Lloyd was at the least fully aware of Henderson's presence; whether his comments were, in a technical sense, directed at Henderson or not is, in such circumstances, irrelevant.

¹³ He filed the charge underlying this proceeding on November 19.

"the Company must post these jobs as permanent bid." While Hargis' "recollection" was that this provision applies to situations in which "a driver or adequate drivers are absent to perform the function of the drivers," it seems in fact only to apply to newly-created, "extra," routes. In addition, the contract provides for a straight pay, rather than commission pay, system to take effect on January 1, 1981, which may be a pertinent factor here.

Since Hunt substituted for Blumenthal until the return of the latter in January 1981, and since Hunt is junior in tenure to Harsch, it seems clear that whatever relevant "seniority" changes were wrought in the system in and after November, Harsch would have been permitted to serve the route for some period of time had he not filed the grievance. I shall therefore recommend a remedy which makes Harsch whole for wages lost as a result of his removal from the Blumenthal route, and for losses sustained by him, if any, after Blumenthal's return, leaving to a compliance proceeding the determination of the amount due in the light of alterations in the system. Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

I shall also recommend that Respondent be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER¹⁴

The Respondent, Universal Foods Corporation, d/b/a St. Louis Dr. Pepper Bottling Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees for filing grievances under a collective-bargaining agreement or for assisting Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, or for engaging in other protected union or concerted activity.

(b) Coercing employees by telling them that another employee is being disciplined for exercising rights guaranteed by the Act.

(c) In any like manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any and all such activities.

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make David Harsch whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of backpay due.

(c) Post at its place of business at St. Louis, Missouri, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁵ In the event this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discriminate against any employee for filing grievances under a collective-bargaining agreement or for assisting Teamsters Local Union No. 688, affiliated with Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, or for engaging in other protected union or concerted activity, and WE WILL

NOT tell employees that other employees are being disciplined for exercising rights guaranteed them by the Act.

WE WILL NOT in any like manner interfere with, coerce, or restrain employees in the exercise of their rights under the Act.

WE WILL make David Harsch whole, with interest, for any losses sustained by him as a result of his November 19, 1980, reassignment, as ordered by the Board.

UNIVERSAL FOODS CORPORATION, d/b/a
ST. LOUIS DR. PEPPER BOTTLING COMPAN-
NY